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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
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1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	))))	MM Docket No. 98-35

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COMMENTS OF VIACOM INC.

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COMMENTS OF VIACOM INC.

Viacom Inc. ("Viacom") hereby submits its comments in the above-captioned biennial review proceeding,[1] which was initiated by the Commission at the direction of Congress in Section 202(h) of the Telecommunications Act of 1996 ("1996 Act") to review the FCC's ownership rules affecting the broadcasting industry. In particular, Viacom's comments herein are directed to the "dual network rule"[2] and the national television audience reach limitation.[3]

[1] *See Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules*, MM Docket No. 98-35, 13 FCC Rcd 11276 (1998).

[2] 47 C.F.R. § 73.658(g). The dual network rule as it now stands permits a single entity to maintain multiple broadcast networks *unless* such networks are comprised of: (i) two or more of the four major networks that were in existence on the date of enactment of the 1996 Act-- *i.e.*, ABC, CBS, NBC, and Fox or (ii) any one of those four major networks and an "emerging network" that, as of the 1996 Act's enactment, provided four or more hours of English-language programming per week "pursuant to network affiliation arrangements with local television broadcast stations in markets reaching more than 75 percent of television homes (as measured by a national ratings service)."

[3] 47 C.F.R. § 73.3555(e). The audience reach limitation, or "national cap," specifies that a single party may hold attributable interests in television stations licensed to markets constituting no more than 35 percent of all U.S. television households.

These rules have been the subject of ongoing FCC review since at least 1992, and consideration of possible repeal or modification of the rules was specifically incorporated into the biennial review proceeding. These comments are submitted to supplement the record in this proceeding in order to demonstrate that the two rules no longer serve any public interest purpose and to highlight, as an example of the serious adverse public interest consequences of these rules, their impact on the United/Paramount Network, or UPN, a struggling new over-the-air television network that Viacom has helped to create and nurture.[4]

I. Summary and Introduction

On November 16, 1999, Viacom filed an application for consent to acquire control of the television and radio broadcast stations licensed to CBS Corporation ("CBS") and its subsidiaries. CBS currently owns and operates 20 full power television stations serving markets with a combined audience reach of approximately 32.98 percent.[5] Viacom, through its Paramount Station Group ("Paramount"), currently owns and operates 18 television stations with an aggregate audience reach of approximately 13.21 percent.[6]

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[4] Viacom and CBS Corporation entered into an Agreement and Plan of Merger on Sep. 6, 1999, long after the end of the normal comment cycle in this proceeding. Viacom submits, however, that the information submitted in these comments is necessary to complete the record and ensure the Commission's full and fair consideration of the issues that are before it in the biennial review proceeding. To the extent it may be deemed necessary, Viacom is filing, concurrently herewith, a request for leave to file these comments.

[5] CBS also owns 30 percent of TeleNoticias, LLC, which provides programming to WEYS(TV), Key West, Florida (Miami DMA).

[6] These figures include unbuilt station KSCC(TV), Hutchinson, Kansas (Wichita-Hutchinson DMA), of which a Viacom subsidiary is the permittee. Viacom also has an attributable interest in WDHF(TV), Florence, Alabama (Huntsville-Decatur-Florence DMA), by virtue of its non-insulated membership in Valley Television, LLC, the station's licensee. In addition,

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In addition, CBS operates the CBS Television Network, with which its owned and operated television stations are affiliated. Viacom, for its part, is a 50 percent partner in UPN, with which the Paramount stations are affiliated. (The remaining 50 percent is owned by Chris-Craft Industries, Inc., through its subsidiary BHC Communications, Inc.) Consequently, the proposed transfer of control may implicate the Commission's dual network rule. Further, because the combined CBS and Viacom (Paramount) owned and operated station groups will have a total audience reach of approximately 41.388 percent, the proposed transfer involves the current 35 percent national audience cap.

The Commission has recognized in previous proceedings that both the dual network rule and the audience cap are outdated and unnecessary. Whatever the rules' original purposes may have been, it is now clear that they have outlived their usefulness and, in fact, their continued application will bring about results that are directly contrary to the public interest. Indeed, if one believes that free, universal television is in the public interest, the government should be encouraging the flow of capital into this service, rather than stanching it. Perversely, however, the dual network rule and the national cap distort the flow of capital and programming resources by penalizing free, over-the-air broadcasters and artificially redirecting capital to subscription services.

(...Continued)
Viacom has a local marketing agreement ("LMA") with WLWC(TV), New Bedford, Massachusetts (Providence, RI-New Bedford DMA), and has applied for consent to acquire that station. Finally, Viacom has an LMA with WTVX(TV), Fort Pierce, Florida (West Palm Beach-Fort Pierce DMA). If these three stations are taken into account, the combined audience reach of stations in which Viacom has an interest would be 13.97 percent. (The audience reach of the CBS and Viacom/Paramount station groups is calculated herein as provided in Section 73.3555 of the Commission's rules.)

The adverse impact of these anachronistic rules is well-illustrated by the harm that they may now cause to the fledging UPN network. Launched in 1995 as an alternative voice to the "Big Four" broadcast networks, UPN has been forced to struggle to assemble a network of affiliates from less desirable UHF facilities, low power television ("LPTV") stations, and, in a few cases, agreements with local cable operators to provide "fill-in" coverage.[7] Despite its limited distribution system, UPN has managed to distinguish itself by providing programming that appeals uniquely to underrepresented segments of our society and by providing opportunities for minority writers, producers and actors that are unmatched by any other network. As a result, UPN has achieved disproportionately high acceptance among African-Americans.

Notwithstanding these efforts, however, UPN has suffered significant financial losses in every year of its existence. Indeed, analogous to a "failing station," in FCC parlance UPN may be viewed as a "failing network" in that it is not financially self-supporting. The support provided by Viacom has been crucial to this nascent network. In this regard, the Viacom owned and operated stations have been especially critical because they provide a source of profits to fund network development and program distribution. A careful consideration of the Viacom/CBS example demonstrates that the dual network and national audience cap rules

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[7] In fact, UPN's distribution chain does not appear to meet the affiliate-reach benchmark established in the dual network rule, either today or as of February 8, 1996 (the operative date for application of the rule). The network has primary affiliations with full power over-the-air television stations in markets representing *less* than 75 percent of the nation's television homes. Thus, the Commission reasonably could determine that the dual network rule is not applicable to UPN at all. *See* Section III.D, *infra*.

frustrate the development of new over-the-air programming services and, thus, directly contravene the objectives of the rules, to the detriment of the public interest.

II. The Dual Network Rule and National Audience Cap Are Outdated and Counterproductive.

In two separate notices of proposed rulemaking adopted in 1995, the Commission proposed to eliminate or relax substantially the dual network and national cap rules. Before action was taken in those proceedings, the 1996 Act directed the Commission to permit the common ownership of two networks, subject to limited exceptions potentially applicable here, and to raise the national television audience reach limitation to 35 percent. Congress also required the Commission to review, on a biennial basis, all of its broadcast rules — *including the recently revised dual network rule and national cap rules* — and to "repeal or modify any regulation it determines to be no longer in the public interest."[8] For the reasons set forth below, Viacom submits that these two particular rules have outlived their usefulness and should be eliminated.

A. The Commission Has Already Recognized That the Dual Network Rule No Longer Promotes Diversity and Competition and, Instead, Frustrates Public Interest Objectives.

Over seven years ago, the Commission expressed the view that the dual network rule could be repealed "with little risk to diversity" and, as a result, proposed to eliminate it entirely.[9] The Commission also concluded that retaining the rule could have the undesired

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[8] *1996 Act*, § 202(h).

[9] *See Notice of Proposed Rulemaking In the Matter of Review of the Commission's Regulations Governing Television Broadcasting*, 7 FCC Rcd 4111, 4118 (1992) ("*Review of Television*
(Continued...)

effect of inhibiting the development of new over-the-air services and stifling innovation, especially as the television industry migrated to digital technology.[10] The passage of time has made both conclusions all the more obviously correct.

The original dual network rule, first adopted 58 years ago, prohibited a station from affiliating with an entity that maintained two or more radio networks. The regulation was based on a report that expressed the Commission's general concern that the major networks might impede the development of new program sources and exert undue influence over their affiliates.[11] In 1946, the rule was applied to the infant television broadcasting industry. This was done, as the Commission has recently noted, "without additional analysis or comment."[12]

The FCC repealed the radio dual network rule in 1977 due to the tremendous increase in the number of radio stations, the lessening economic importance of networks, and changes in the nature of radio programming.[13] For similar reasons, the Commission subsequently proposed to eliminate the dual network rule as applied to television broadcasting.

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Rules"); *see also Notice of Proposed Rulemaking In the Matter of Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates*, 10 FCC Rcd 11951, 11967-68 (1995) ("*Review of Network Rules*").

[10] *Review of Television Rules,* 7 FCC Rcd at 4118; *Review of Network Rules*, 10 FCC Rcd at 11959, 11974.

[11] *See Review of Network Rules*, 10 FCC Rcd at 11953. The rule was directed squarely at NBC, which was then the only entity that operated two radio networks. *See Review of Television Rules*, 7 FCC Rcd at 4117.

[12] *Review of Television Rules*, 7 FCC Rcd at 4111.

[13] *Id.* at 4112.

Thus, in 1992, the Commission observed that there had been rapid growth in the number of multichannel service providers, such as cable and satellite network services (which are not subject to the rule). Moreover, the agency noted that these operators "enjoy certain economies of scale and marketing advantages."[14] Consequently, "broadcast networks seeking to become multichannel service providers have confronted certain regulatory barriers to doing so, and *those barriers appear to have channeled the networks' activities into non-broadcast enterprises*."[15] The Commission recognized that, because the rule proscribed the maintenance of two *broadcast* networks, broadcasters were funneling their resources into non off-air media. For example, NBC operated CNBC (and now MSNBC), and Capital Cities/ABC (now Disney/ABC) acquired a substantial interest in the ESPN and A&E cable networks.[16] As a result, the dual network rule, which was intended to promote the development of new over-

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[14] *Id.* at 4117-18.

[15] *Id.* at 4118 (emphasis added).

[16] *Id.* Since 1992, NBC and Disney/ABC have expanded their cable presence. NBC now has interests in the History Channel, Court TV, and Rainbow Media Holdings, Inc., whose cable networks include AMC, Bravo, Independent Film Channel, Much Music, Madison Square Garden Network (regional), Fox Sports Net (Rainbow Media owns 50 percent), and Romance Classics. General Electric Capital Corp. Annual Report, SEC Form 10-K (Mar. 29, 1999); *NBC*, www.ge.com/bizfind/right_java.htm; *Rainbow Present*, www.rainbow-media.com/philosophy/present.html. Disney/ABC now owns the Disney Channel and Toon Disney, as well as 80 percent of ESPN, Inc., which operates ESPN, ESPN2, Classic Sports Network, and ESPNEWS; 37.5 percent of A&E Television Networks, which operates A&E and The History Channel; 50 percent of Lifetime Entertainment Services, which operates Lifetime Television and Lifetime Movie Network; and 39.6 percent of E! Entertainment Television, which also operates Style. The Walt Disney Co. Annual Report, SEC Form 10-K (Dec. 18, 1998). Fox now has investments in nine U.S. cable programming services: Fox News, Fox Sports, FX, FXM, Speedvision, Outdoor Life, Fox Family, The Golf Channel, and The Health Network. Fox's parent, News Corp., has an interest in Rainbow Media as well. Fox Entertainment Group, Inc. Annual Report, SEC Form 10-K (Sept. 27, 1999). CBS also has entered the cable arena, with CMT (Country Music Television) and TNN (The Nashville Network).

the-air networks, was having precisely the opposite effect, to the detriment of its primary intended beneficiaries — the 30 percent of American households who receive only over-the-air services.

The Commission concluded that the rule frustrated other public interest objectives as well. Even though networks possessed the resources to invest in new technologies, this regulation forestalled innovation and restricted networks' ability to use their newsgathering and other resources to compete with other multichannel providers.[17] The rule also could inhibit the development of new services - such as alternative language feeds and time-shifted networks - that were available to cable subscribers. Significantly, the Commission concluded that repeal of the rule would not harm diversity due to the proliferation of over-the-air and non-broadcast outlets that provide a "multiplicity of network and other program sources" for consumers.[18]

Three years later, in a separate 1995 rulemaking proceeding, the Commission again questioned whether network regulations, including the dual network rule, "are necessary to achieve [the twin goals of promoting competition and development of new networks] or, conversely, whether the rules increase the costs of networking without producing any real benefits."[19] After reiterating its earlier conclusion that the dual network rule was no longer justified, the Commission called for additional comment as to how repeal of the regulation

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[17] *Review of Television Rules*, 7 FCC Rcd at 4118.

[18] *Id.*

[19] *Review of Network Rules*, 10 FCC Rcd at 11954.

could result in "economies of scale and scope for networks and affiliates and provide independent stations with an alternative programming stream."[20]

Before the Commission acted on either the 1992 or 1995 rulemaking proceedings, the 1996 Act directed the Commission to relax the rule greatly, while maintaining two limited exceptions.[21] Under Section 73.658(g), as revised in response to Congress' directive, a station may affiliate with an entity that "maintains" two or more television networks, unless such networks are comprised of: (a) ABC, NBC, CBS or Fox; or (b) one of these Big Four networks and "an English-language program distribution service that, [on February 8, 1996], provided four or more hours of programming per week on a national basis pursuant to network affiliation agreements *with local television broadcast stations in markets reaching more than 75 percent of television homes* (as measured by a national ratings service)."[22] (In other words, the new dual network rule permits any combination of broadcast networks *except* those involving the Big Four and certain English-language networks in existence on the date the 1996 Act and having the specific reach.) Despite this change, Congress directed the Commission to review the new dual network rule — as well as the rest of the broadcast ownership rules — as part of the required biennial proceedings, and to "repeal or modify any

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[20] *Id.* at 11969. Significantly, the 1995 network proceeding remains outstanding, and action is overdue.

[21] 1996 Act, § 202 (e).

[22] 47 C.F.R. § 73.658 (g) (emphasis added).

regulation it determines to be no longer in the public interest."[23] Thus, the dual network rule is under review in this proceeding.

The legislative history of the 1996 Act assumes, without factual analysis, that the second prong of the revised rule, which sets forth the criteria for determining which new broadcast networks are subject to the restriction, applies to UPN and the WB network.[24] Similarly, in adopting implementing regulations, the FCC concluded, without citation or review of UPN's audience reach, that the statute "in effect encompasses" UPN.[25] In fact, at the time of enactment of the 1996 Act and, indeed even today, UPN's primary distribution by full power affiliates falls below the affiliate reach benchmark. Specifically, then as now, UPN's reach has been limited to only approximately 73 to 74 percent through *full power* television stations under *primary* network affiliation agreements. Thus, it is not clear that UPN is, in actuality, a "network" for purposes of the rule.[26] In any event, as detailed below, retention of the dual network rule stifles investment in broadcasting and, as illustrated by its potential application to Viacom and UPN, frustrates the Commission's public interest objectives.

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[23] 1996 Act, § 202(h).

[24] H.R. Conf. Rep. No. 104-458, at 163 (1996).

[25] *Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996,* 11 FCC Rcd 12374, 12376 (1996).

[26] *See* Section III.D, *infra*.

B. Similarly, the Commission Has Recognized Repeatedly That the National Ownership Cap Is Unnecessary To Promote the Twin Goals of Competition and Diversity.

As in the case of the dual network rule, the need for a national television ownership limit has been questioned repeatedly by the Commission. Fifteen years ago, the FCC concluded that there was "little possibility that repeal of the [then-seven station] rule could cause competitive or diversity harm," and that "licensees should be afforded the opportunity to exploit any possible efficiency from group ownership."[27] After its 1984 review of the seven station rule, the Commission concluded that changes in the TV marketplace – including the increase in the number of broadcast stations and the emergence of cable – had rendered the national ownership limitation unnecessary to protect diversity and competition.[28]

The Commission further found that the rule actually disserved the public interest by impeding the realization of economies of scale and other benefits of group ownership.[29] On this basis, the FCC increased the maximum number of stations from seven to twelve for a transitional six-year period, after which the regulation would "sunset" in its entirety.[30] On reconsideration, the FCC removed the automatic sunset and reaffirmed its fundamental

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[27] *Amendment of Commission's Rules Relating to Multiple Ownership*, 100 FCC 2d 17, 24 (1984) ("*1984 Multiple Ownership R&O*").

[28] *Id.* at 18-20.

[29] The Commission's conclusions have been confirmed by a new and exhaustive economic analysis. *See* Michael L. Katz, "Old Rules and New Rivals: an Examination of Broadcast Television Regulation and Competition," September 1999, submitted to the Commission by letter of Bruce D. Sokler, Nov. 18, 1999.

[30] *Id.*

conclusion that "the total elimination of a presumptive national ownership rule would benefit the public interest [and] would not contravene our traditional policy objectives of promoting diversity and preventing undue economic concentration."[31] The FCC also established a national audience reach limit of 25 percent of television households generally.[32]

The FCC launched another rulemaking proceeding in 1992 to consider further relaxation of the national ownership regulations. In that proceeding, the FCC again questioned the rationale for the audience cap, stating: "[W]e believe that the primary concern underlying the national ownership rule - preventing economic concentration and consequent harm to diversity - may have been abated with the proliferation of television stations and alternative sources of video programming...."[33] Indeed, according to a new economic analysis, the explosion in competition from other broadcast and non-broadcast sources, the decline in network ratings, and the dramatic shift away from advertiser-only broadcast services, render the rule wholly unnecessary to promote competition.[34]

As recently as 1995, the Commission again concluded that liberalization of the national ownership limits would not have an adverse impact on the competitiveness of economic markets or on viewpoint diversity.[35] Accordingly, the Commission proposed several

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[31] *Id.* at 97.

[32] *Id.*

[33] *Review of Television Rules*, 7 FCC Rcd at 4113.

[34] Katz Study at Section III.

[35] *Further Notice of Proposed Rule Making In the Matter of Review of the Commission's Regulations Governing Television Broadcasting,* 10 FCC Rcd 3524, 3566-67 (1995) (*"TV Further Notice")*.

alternatives to the then-existing 12-station/25 percent reach limit, including eliminating the restriction on the number of stations that could be owned by a single entity and incrementally raising the audience reach cap to 50 percent of national television households.[36] In order to avoid the potential for "significant dislocation in the television industry,"[37] the Commission proposed that the national audience reach limit might be raised by five percent every three years, until a final cap of 50 percent was reached.[38]

As noted by the FCC, a national ownership rule does not promote diversity. "[T]he most important idea markets are local... [N]ational broadcast ownership limits, as opposed to local ownership limits, ordinarily are not pertinent to assuring a diversity of views to the constituent elements of the American public."[39] A national cap also does not promote localism in terms of a station's involvement with the community or programming focusing on local issues. Indeed, studies have concluded that there is "no evidence that disparate station ownership on the national level has any effect" on local viewpoint, source or outlet diversity.[40] Communities all across the country have been superbly well-served for years by affiliated stations that are under group ownership. Moreover, as the FCC itself has correctly observed, "the economics of each local market require autonomous decisions by each station with respect

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[36] *Id.* at 3586.

[37] *Id.* at 3567.

[38] *Id.* at 3568.

[39] *1984 Multiple Ownership* R&O, 100 FCC 2d at 37.

[40] Katz Study at 67-68.

to its editorial judgments."[41] In short, broadcasting is necessarily local, regardless of where the home office may be.

The 1996 Act, which ordered the FCC to eliminate the numerical limit on the number of stations and raise the audience cap to 35 percent, was adopted before the Commission completed its 1995 rulemaking proceeding. As noted above, however, Section 202(h) of the 1996 Act directed the FCC to review *all* of its ownership rules — including those modified pursuant to the Act — biennially and to modify or repeal those that no longer can be shown to serve the public interest. Not only is the 35 percent limit inconsistent with the public interest, it has undermined the intent of the rule by restraining the ability of free, over-the-air television to compete. And, all the while, cable, satellite, and other subscription services have been permitted to grow unfettered.

C. The Dual Network and National Cap Rules Are Obsolete in Today's Highly Competitive Media Marketplace.

In today's intensely-competitive environment, the dual network and national audience cap rules are plainly anachronistic. Declining network influence, increasing competition from multichannel providers such as cable and satellite-delivered services — who are unencumbered by broadcast network or national audience limitations - and the emergence of a highly fractionalized marketplace have compelled broadcast services to seek increased efficiencies and other operational benefits in order to sustain programming.

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[41] *Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 57 R.R. 2d 966, 973-74 (1985).

Far from holding the power they were thought to hold long ago, broadcast television networks today clearly lack any semblance of marketplace "dominance." From the 1979-80 TV season, when ABC, CBS and NBC still enjoyed a combined national audience share of more than 90 percent, the share of the three traditional networks had dropped to about 47 percent by the 1997-98 season.[42] Presently, the *combined* audience of the six broadcast networks amounts to approximately 40 percent of total U.S. households during prime time.[43] In contrast, the share of homes viewing cable network programming has skyrocketed. From the 1993-94 season to the 1998-99 season, the share of viewers watching programming from cable networks increased 71 percent, whereas the combined share of viewers tuning in to broadcast networks declined by 29 percent.[44] A recent study has found that, in the first week of August 1999, prime time and total-day ratings for basic cable exceeded the ratings for the Big 4 networks combined.[45]

Moreover, as a group, the television broadcast networks are struggling economically. Last year NBC was the only broadcast network to turn a profit. In contrast, the picture is quite different (and much more promising) for cable networks. The four largest broadcast networks *combined* generated *less* profit than *any* of the top-10 cable networks.[46] This difficult

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[42] *See* Nielsen Television Index, Sep. 22, 1997 to May 20, 1998; *see also* "Can The Big 4 Still Make Big Bucks?" *Broadcasting & Cable*, Jun. 8, 1998, at 24.

[43] *See* Katz Study at 11.

[44] Nielsen Media Research, Combined Network Shares.

[45] "Cable Consistently Is Beating Big 4 Networks," *Communications Daily,* Aug. 11, 1999, at 8.

[46] *See* Paul Farhi, "Clap If You Love Mega TV! Without the Conglomerates, You Can Wave (Continued...)

financial picture for network broadcasting in general is even more dire for an emerging network such as UPN.[47]

As network influence has declined, competition in the national program and advertising markets has increased dramatically. National broadcast networks compete with a wide range of media sources, including other TV networks, syndication and cable networks, national radio networks, magazines and newspapers. Studies show that the media marketplace is enormously competitive and diverse, rendering the need for artificial structural limitations wholly unnecessary.[48] And within the past five years, the breathtakingly rapid development of the Internet has transformed the information/entertainment marketplace in a way that was unimaginable when these rules were adopted. With video streaming soon to be widely available, a limitless array of Internet services will be added to the already abundant competition with which over-the-air networks must deal.

Just three months ago, in its far-reaching television ownership decision, the Commission concluded that competition and diversity are on the rise, as a result of an "increase in the number and types of media outlets available to local communities."[49]

(...Continued)
Goodbye to Free, High-Quality Shows," *Washington Post*, Sep. 12, 1999, at B1.

[47] Significantly, cable program services and broadcast network services operate on very different economic models. Whereas cable services generally are paid for the right to distribute their programming, broadcast networks must *pay* (either through cash compensation or advertising availabilities) for such distribution. The sale of advertising time is a broadcast network's only source of revenue.

[48] *See Economists Incorporated,* "An Economic Analysis of the Broadcast Television Ownership, Local Ownership and Radio Cross-Ownership Rules," May 17, 1995.

[49] *Report and Order In the Matter of Review of the Commission's Regulations Governing*
(Continued...)

According to the FCC's own calculations, there has been an explosion in the number and variety of media outlets available to consumers: approximately 11,600 cable systems pass more than 94 million homes and serve almost 65 million TV households; direct broadcast satellite companies provide up to 240 channels to over seven million subscribers (and cover the entire country with their footprints); multichannel multipoint distribution service, satellite master antenna television, and home satellite dish services reach an additional four million homes; OVS is expanding; and digital television is providing new opportunities to increase program supply and variety.[50]

In addition to these multichannel video program distributors, the number of broadcast stations has increased dramatically. Since 1970, the total number of radio and TV stations has increased by over 85 percent (to 14,219 full power stations nationwide).[51] The Commission rightly applauded its efforts to foster these services, which have dramatically increased competition and expanded choices for consumers and advertisers.[52]

A critical (and inevitable) effect of the rise in competition has been the increasingly fractionalized nature of the electronic media marketplace.[53] The fragmentation of the audience

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Television Broadcasting, MM Docket Nos. 91-221 and 87-8, FCC 99-209 (rel. Aug. 6, 1999) at ¶ 7 *(TV R&O)*.

[50] *Id.* at ¶ 29. In fact, DBS reportedly now serves more than *ten* million homes. *See Satellite Business News,* Nov. 17, 1999, at 1.

[51] *TV R&O* at ¶ 29; *Broadcast Station Totals as of August 31, 1999*, FCC News Release (Oct. 18, 1999).

[52] *TV R&O* at ¶ 28.

[53] Today, approximately 75% of Americans subscribe to cable or satellite, giving them a
(Continued...)

has a corresponding negative effect on broadcast advertising revenues, forcing broadcasters to find ways to prosper while reaching a *shrinking* segment of the market – and facing steadily *increasing* programming costs. This tension between declining revenues and escalating costs highlights the importance to broadcast services of exploring and exploiting all possible economies of scale. Indeed, the Commission has long recognized the efficiencies that can be derived from common ownership, including: joint financial, legal, research, and administrative and support functions; joint purchasing of equipment (especially with the high cost of digital conversion); joint purchasing of services (*e.g.*, programming consultants, ratings services); joint negotiation for exhibition rights to syndicated programming; fluidity in the allocation of scarce human resources, such as on-air talent and specialized management; and sharing of news and program resources among stations.[54]

These efficiencies enable services unencumbered by regulatory obstacles to thrive. For example, a party is free to own and operate an unlimited number of cable networks. Similarly, DBS providers are permitted to reach 100 percent of the country and to originate

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choice, on average, of 57 channels of video programming. This compares to the 20% cable penetration rate in 1979. *See* Paul Farhi, "Clap If You Love Mega TV! Without the Conglomerates, You Can Wave Goodbye to Free, High-Quality Shows," *The Washington Post,* Sep. 12, 1999, at B1. VCRs are in 90 percent of all homes, allowing viewers to watch what they want and when they want. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 13 FCC Rcd 1034, 1096 (1998). Pay-per-view is available at the touch of a remote. Video stores are located in every neighborhood. Multiplex movie theaters are proliferating. Video-on-demand is being rolled out by cable operators. And the Internet is now available in the great majority of homes, offering consumers a one-on-one experience on thousands of websites, many of which stream video programming. Soon, with the implementation of digital television service, every broadcast TV station will be capable of transmitting at least 6 channels of video.

[54] *See, e.g., TV R&O* at ¶ 57.

programming on channels targeted to multiple niche audience segments. This freedom allows the provider to spread the costs of programming rights across a wider range of outlets. Similarly, a broadcast network may acquire interests in additional distribution channels by creating new cable network services (or, like NBC in its deal with Pax TV, combining with an over-the-air network that was created after 1996).[55] Some of these combinations can be very profitable — for example, ABC's ESPN is projected to post $750 million in operating income for fiscal 1999, and NBC's CNBC is expected to earn $240 million in profits for 1999.[56] However, by limiting ownership of broadcast networks and local outlets, the dual network and audience cap rules have served to fuel the cable programming business at the expense of broadcasters, and the 30 percent of the country without cable service.

The perpetuation of the national television audience limitation is particularly arbitrary in light of the Commission's recent decision permitting cable operators effectively to increase their national reach well beyond that of the typical broadcast company. Thus, changing the basis for calculating compliance with the cable horizontal ownership limits, the Commission revised the standard from homes *passed* to homes *actually served*, not just by cable but by all multichannel video program distributors nationwide.[57] The practical effect of the ruling is to

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[55] As discussed in greater detail below, NBC and Paxson Communications recently announced a deal in which NBC will acquire a substantial stake in Paxson, significant rights in that company's management, and access to the new PAX TV network as a second national distribution chain for NBC's entertainment programming.

[56] "As Tide Turns, Cable Sails Past Big 4," *Electronic Media,* Aug. *16, 1999, at 13.*

[57] *See Third Report and Order In the Matter of Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 92-264, FCC 99-289, rel. Oct. 20, 1999. Because of court challenges to the constitutionality of the cable horizontal limits, the Commission maintained its voluntary stay of the new rules.

allow a single cable operator — which typically is the *only* provider of cable service to any community — to serve as much as approximately 37 percent of all U.S. television households. In that 37 percent of the country, however, a cable operator is likely to be the *only* cable operator. In contrast to the typical cable operator, which the Commission itself characterizes as a "gatekeeper" and which also can originate numerous channels of programming of its own — a television station must compete against a broad array — anywhere from two to as many as several dozen other free, over-the-air television stations, depending upon the number of competing TV stations present.[58] "[E]ven though a strong broadcaster is being viewed on a given day by less than one out of seven homes it passes in a given market, all of the houses in that market are counted against its 35% national limit."[59] Accordingly, a broadcaster that is now deemed to have 35 percent national reach should, realistically, be understood to have a reach of only about one-seventh of 35 percent, or five percent.

Thus, the national audience cap prevents a single party from operating free, over-the-air television stations in markets where there are already a host of direct competitors. In short, broadcasters, unlike their cable competitors, face a plethora of competition from other over-the-air and non-broadcast program providers not only in the national marketplace, but in each of their local markets as well.

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[58] For example, as indicated in the Viacom/CBS application filed November 16, 1999, at least 25 independently-owned TV stations compete for audiences in the Los Angeles, California DMA.

[59] Katz Study at 32.

A recent economic analysis of the effects of the national television ownership rule found no evidence that the rule "serves any policy goal."[60] The rule does not promote competition or enhance diversity, since ownership of a station in one local market does not affect viewpoint diversity in any other local market. To the contrary, the rule "raises costs, leads to a less efficient organization of the industry, and therefore reduces program quality and raises the cost of advertising."[61] The study finds that the rule needlessly inhibits economies of scale and scope associated with ownership of multiple stations, which increases costs and reduces incentives to invest in over-the-air television. In particular, the study concludes that revenues generated from national advertising generally do not cover program costs. A network relies on the profits generated by affiliated O&Os to justify its investment in programming. Restricting a network's ownership of profitable stations, therefore, substantially decreases its incentive to invest in programming developed solely for television. Instead, it increases a network's incentive to divert its resources to creating cable networks, where it can earn revenues through subscription fees as well as advertising sales.[62]

Finally, under any standard, the television audience cap raises serious First Amendment concerns. The cap prohibits broadcasters from speaking to more than a certain number of listeners. As such, it is a direct suppression on speech. Moreover, its apparent motivation – that one speaker's voice may be too persuasive – is impermissible.[63] Any

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[60] Katz Study at iii.

[61] *Id.*

[62] *Id.* Katz Study at 45-47, 56-57.

[63] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("At the heart of the First
(Continued...)

measure that – like the national audience reach cap – is designed to prevent particular speakers from speaking too much speech triggers strict scrutiny.

In *Grosjean v. American Press Company*,[64] the Supreme Court invalidated a sales tax on newspapers with a circulation exceeding 20,000 copies per week. The Court held that such a tax unconstitutionally "limit[ed] the circulation of information to which the public is entitled."[65] Yet a quota on the percentage of households a broadcaster may reach is "constitutionally indistinguishable from a tax imposed upon the quantity of a newspaper's circulation."[66] Indeed, the national cap is an even more direct restraint on the ability to communicate. The FCC could not conceivably demonstrate that the national cap "promote[s] a compelling interest" and is "the least restrictive means to further [that] interest."[67]

Even if the national audience reach cap were considered to be content-neutral, it would at least be subject to so-called "intermediate" First Amendment scrutiny. A measure can survive such scrutiny only if "it furthers an important or substantial governmental interest," if that interest is "unrelated to the suppression of free expression," and if the burden imposed is

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(...Continued)
Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression.").

[64] 297 U.S. 233 (1936).

[65] *Id.* at 250.

[66] *Daniels Cablevision v. United States*, 835 F.Supp. 1, 10 (D.D.C. 1993), *rev'd on other grounds, sub nom. Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) (invalidating, on First Amendment grounds, a numerical limit on the quantity of subscribers a cable operator may enroll).

[67] *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

"no greater than is essential to the furtherance of that interest."[68] For the government to meet this standard, it must demonstrate both that a substantial problem exists and that "the regulation will, in fact, alleviate these harms in a direct and material way."[69]

As noted above, one can hardly argue that a nationwide shortage of media voices exists in today's vastly diverse mass media marketplace. Moreover, in regulating other services, also dependent upon the use of the nation's spectrum, the FCC has *required* that they serve a national audience.[70] Such an inconsistency undercuts any claim that there is a substantial governmental interest involved.[71]

Even assuming that a diversity problem did exist, the national cap fails to serve this asserted interest in promoting diversity in any geographic market. Indeed, in the 1984 decision in which the FCC relaxed a former incarnation of its current national cap – the so-called "Seven Stations Rule" – the agency noted that "whereas the Rule imposes a national ownership limit, we believe that the more correct focus for addressing viewpoint diversity and economic competition concerns is . . . in local markets, a matter that is not addressed by a nationwide restriction on ownership."[72] Thus, a national audience limit "bears no relationship

[68] *Turner Broadcasting System*, 512 U.S. at 662.

[69] *Id.* at 664.

[70] *See* 47 C.F.R. § 100.53 (requiring DBS operations to provide services to Alaska and Hawaii). In addition, in an ongoing rulemaking proceeding, the Commission has proposed to *expand* DBS geographic service obligations to include Puerto Rico and other U.S. territories and possessions. *Notice of Proposed Rulemaking, Policies and Rules for the Direct Broadcast Satellite Service*, 13 F.C.C.R. 6907, 6925 (1998).

[71] *Greater New Orleans Broad. Ass'n., Inc. v. United States*, 119 S.Ct. 1923, 1933 (1999).

[72] *1984 Multiple Ownership R&O*, 100 FCC 2d at 20.

whatsoever to the particular interes[t] . . . asserted," making it "an impermissible means of responding."[73]

In addition, if a limitation on "reach" is necessary to promote competition, the First Amendment is generally understood to require the government to make that assessment on a case-by-case basis rather than by adopting a broad prophylactic approach.[74] Such prophylactic rules are by definition not narrowly tailored.[75]

These constitutional concerns are not allayed by the reduced protection afforded broadcasters under *Red Lion*. Even if the *Red Lion* doctrine is still valid – a dubious proposition[76] – the scarcity rationale does not support a limit on the number of listeners to whom a speaker may communicate. Indeed, in its 1984 decision relaxing the "seven station limit," the Commission recognized that a national ownership limit is suspect in a situation in which the *Red Lion* standard applies:

> To the extent that the Rule rests upon a premise that broadcasters should be subject to regulatory constraints because of a 'unique' power to influence or persuade . . . we have grave doubts that such a notion can withstand scrutiny on constitutional grounds. The fact that the government may fear the persuasive power of this organ of the press does not mean that the First Amendment allows it to act on those fears.[77]

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[73] *City of Cincinnati v. Discovery Networks, Inc.*, 507 U.S. 410, 424 (1993).

[74] *Edenfield v. Fane,* 507 U.S. 761, 777 (1993) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963).

[75] *Id.*

[76] *See Telecommunications Research and Action Ctr. v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986); *see also Turner Broadcasting System*, 512 U.S. at 638.

[77] *1984 Multiple Ownership R&O*, 100 FCC 2d at 20 (*citing Buckley v. Valeo*, 424 U.S. 1 (1975); *First National Bank if Boston v. Bellotti*, 435 U.S. 765 (1977)).

If the national cap has any rationale at all, it is fear of a broadcasters' power to persuade. Such a notion cannot withstand constitutional scrutiny.

III. The History of, and Prospects for, UPN Are an Apt Case Study of the Perverse Effects of the Dual Network and National Television Multiple Ownership Rules and Their Lack of Public Interest Justification in Today's Burgeoning Media Marketplace

Perversely, as illustrated by their potential effect on Viacom/CBS and UPN, the dual network and national cap rules could foreclose the opportunity for a nascent television network to benefit from the same synergies that are available to other competitors, including cable networks, which are not hindered by the regulatory constraints that limit a broadcaster's ability to provide alternative *over-the-air* services. There seems to be no justification for shackling an emerging and struggling broadcast television network while other services are free to pursue such opportunities.

A. Handicapped by a Limited Distribution System, UPN Has Nevertheless Created An Important Voice for Under-Represented Americans That Would be Jeopardized by Strict Application of the Rules

1. Since Its Creation, UPN Has Struggled to Build an Effective National Distribution Chain

UPN was developed in 1994 as a co-venture between movie studio and television station group owner Paramount Pictures and TV group owner United Television, Inc. (a subsidiary of Chris-Craft Industries, Inc.). UPN was launched on January 16, 1995, with four hours of programming broadcast on two nights per week.[78] That same year, Viacom acquired Paramount. At the outset, United/Chris-Craft was the sole operator of the new network but, in January 1997, Viacom exercised an option to become a 50 percent owner of the UPN venture. That 50/50 ownership structure remains in effect today. As a result, the management and operation of UPN are not subject to one party's unilateral control.

Unlike the established networks, UPN affiliates receive revenues principally from spot availabilities. Therefore, UPN is "sold" to stations on its merits alone. Moreover, because the four established networks had long since entered into relationships with the most desirable stations - VHF stations and well-located UHF facilities - UPN had to compete with the other new network, WB, for whatever other outlets might be left in each local market. Thus, UPN was forced to cobble together a national network of affiliates comprised of less desirable UHF stations and, in a number of markets, of LPTV facilities, most of which are at a substantial coverage disadvantage vis-à-vis competing stations affiliated with the established "Big Four" networks. In a few markets, UPN was not able to secure an over-the-air affiliate at all and, instead, attempted to arrange fill-in cable carriage.

In addition, some of the UPN affiliates agreed to carry the new network's programming only on a secondary basis, reserving their prime-time hours to the carriage of their primary networks. (These secondary affiliates generally carry only two-to-four hours of UPN programming, most often in low-rated weekend daytime or post-midnight time periods.)

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[78] On Jan. 11, 1995, just days before UPN began operations, Time Warner launched its own new entrant into the television programming arena, the WB network. The two fledging networks had already begun their competition for local outlets, months before their launch dates.

Finally, as a partner in the fledging UPN network, Viacom's Paramount Stations Group determined to build its own station group as UPN-only affiliates. This decision required the company to dispose of valuable CBS-, NBC- , and Fox-affiliated stations in several Top 50 markets, replacing them in most cases with much weaker UHF facilities. [79]

2. UPN Has Achieved a Unique and Important Role in Providing Programming and Creative Opportunities for Under-Served Groups

From the outset, UPN has endeavored to carve a niche for itself in the highly competitive television industry and, in doing so, has presented programming that appeals to traditionally underserved audiences. The new network has distinguished itself by providing, consistently and on a very significant level, opportunities for members of minority groups to

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[79] Thus, Paramount (prior to its merger with Viacom) sold KRRT, then the Fox affiliate in Kerrville (San Antonio), Texas (the 37th market), as well as Fox affiliates, WTXF, Philadelphia (the 4th market), and WLFL, Raleigh, North Carolina (the 29th market), in 1994-95. *See* FCC File Nos. BALCT-940810KE (KRRT); BALCT-940928KF (WTXF); BALCT-940817KE (WLFL). Viacom also disposed of KSLA, a VHF station affiliated with CBS in Shreveport, Louisiana (the 75th market) in 1995. Over the next two years, Viacom transferred VHF outlets (both NBC affiliates) in Albany and Rochester, New York (the 53rd and 77th markets), as well as WVIT (NBC) in New Britain (Hartford/New Haven), Connecticut (the 30th market). *See* FCC File Nos. BALCT-960808KE (WNYT, Albany, NY); BALCT-960808KL (WHEC-TV, Rochester, NY); BALCT-970808KJ (WVIT).

Similarly, Viacom sold CBS affiliate KMOV(TV), Channel 4, in St. Louis (the 21st largest market) to A.H. Belo Corporation in 1997 as part of a three-way exchange in which Viacom received KSTW, Channel 11, the lowest rated VHF facility in the Seattle-Tacoma [79]market, which became a UPN affiliate, and Cox Broadcasting Inc. acquired the more desirable KIRO-TV, Channel 7, the CBS affiliate in that market. *See* FCC File Nos. BALCT-970225IA (KMOV); BALCT-970225IB (KIRO); BALCT-970225IK (KSTW). With the sole exception of KSTW, every station acquired by Viacom after the launch of UPN has been a UHF facility.